Mareva injunction for the purpose of preserving assets and preventing a defendant from dissipating his assets within jurisdiction before judgment. But the remedy is not of unlimited application. On the facts of the appeal before us, the respondent must satisfy the court firstly, that he had a good arguable case; secondly, that the appellant had assets within jurisdiction, and thirdly, that there was a real risk of the assets being dissipated or removed before judgment in that there must be solid evidence to establish the risk. In our opinion, mere refusal to pay a disputed debt and issuing of a dishonoured personal cheque by a director of the second defendant (who was not a party in this appeal), as presented before the learned judge, fell far too short of the necessary evidence to establish real risk of dissipation of assets of the appellant before judgment.

Further, in presenting affidavit evidence to establish the necessary ingredients for an ex parte order for a Mareva injunction, it is incumbent on the applicant to make frank and full disclosures of all material facts. Every material representation must not be misleading, and there must not be any suppression of material facts. Failure to do so at the crucial time of making the ex parte application would invariably be fatal. On this particular point we approve the judgment of VC George J in *KSM Credit & Leasing Sdn Bhd* v *Data Mante (M) Sdn Bhd & Ors*[2] on the applicability of the principle of frank and full disclosures in all ex parte applications for Mareva injunctions.

It is of utmost importance that the remedy of a Mareva injunction should not be abused. The caution for the benefit of the solicitors for the City of London given by Lord Denning MR in *Third Chandris Shipping Corporation & Ors* v *Unimarine SA*[3] (at p 985) had been quoted with approval in *Aspatra's* case at p 104, and we wish, with respect, to adopt the same caution for the benefit of the solicitors in this country.

In this appeal we were satisfied that the material misrepresentation made by the respondent was sufficiently grave to prevent the learned judge from exercising his discretion in the respondent's favour. The remaining representations made in support of the application were manifestly inadequate for the court to hold that there was a real risk of the appellant's assets being dissipated or removed before judgment. For these reasons we allowed the appeal with costs, and dissolved the Mareva injunction granted on 29 June 1987 as prayed for in the appellant's notice of motion.

Appeal allowed.

Solicitors: *Darshan Singh & Co*; *Balasundram & Co.*

Reported by *Prof Ahmad Ibrahim*

Sekemas Sdn Bhd v Lian Seng Co Sdn Bhd

SUPREME COURT (KUALA LUMPUR) – CIVIL APPEAL NO 502 OF 1987
LEE HUN HOE CJ (BORNEO), HARUN AND MOHAMED YUSOFF SCJJ
6 SEPTEMBER 1988 AND 10 MARCH 1989

Contract – Sale and purchase of land – Failure of purchaser to complete – Application for specific performance – Contract also providing for liquidated damages in default of payment – Discretion to grant specific performance – Specific Relief Act 1950, ss 11(2), 20(1)(a) & 21(2)(b).

Equity – Sale of immovable property – Claim for specific relief – Discretion of court – Specific Relief Act 1950, ss 11(2), 20(1)(a) & 21(2)(b)

In this case by an agreement the respondent agreed to sell and the appellant agreed to buy a piece of land in Kuala Lumpur for $15,110,700. The purchase price was to be paid by instalments. The appellant was to give vacant possession after payment of the purchase price in full. However, in order to facilitate development of the property, the respondent at the request of the appellant delivered the property to the respondent despite the fact that payment in full had not been made. The appellant had since demolished all the buildings on the land in order to prepare the land for development. The appellant subsequently failed to pay the last instalment and was given time to pay. The balance was later reduced to $4,500,00. The appellant indicated that he was unable to pay the balance and asked that the sums paid by them under the agreement be refunded subject to deduction of agreed liquidated damages not exceeding 25% of the purchase price, as provided in the agreement. The respondent replied requesting the appellant to complete the purchase and pointed out that the agreement specifically provided for the remedy of specific performance in the event of default by the purchasers to pay any part of the purchase money. The respondent sued the appellant for specific performance and the learned judge in the High Court made an order accordingly. The appellant appealed.

Held, dismissing the appeal:

(1) Specific performance is a discretionary remedy. Although s 20(1)(a) of the Specific Relief Act provides that a contract will not be specifically enforced if the non-performance of it can be adequately relieved by compensation in money, s 11(2) of the Act clearly says that there is a presumption that in contracts for the sale of immovable property monetary compensation cannot be an adequate remedy.

(2) Under s 21(2)(b) of the Specific Relief Act the court may refuse to grant the relief of specific performance to the plaintiff if the granting of it would involve some hardship on the defendant which he did not foresee.

(3) In this case the court agreed with the learned trial judge when he said that hardship had been brought by the appellant himself when he decided to embark on the expensive venture without having secured adequate finance. The learned trial judge had exercised his discretion judicially and properly and there was no reason to interfere with the exercise of his discretion.

Cases referred to

1 *RM Venkatachalam Chettiar & Ors* v *NKR Arunasalam Chettiar* [1953] MLJ 234 (refd)

2 *Haji Osman bin Abu Bakar* v *Saiyed Noor bin Saiyed Mohamed* [1952] MLJ 37 (refd)
3 *Patel and Anor* v *Ali & Anor* [1984] 1 All ER 978 (refd)
4 *Johnson* v *Agnew* [1979] 1 All ER 883 (refd)
5 *Nicholas* v *Ingram* [1958] NZLR 972 (folld)
6 *Zaibun Sa binti Syed Ahmad* v *Loh Koon Moy & Anor* [1982] 2 MLJ 92 (folld)

Legislation referred to
Rules of High Court 1980 O 81
Specific Relief Act 1950 ss 11(2), 20(1)(a), 21(2)(b)

Appeal from: Civil Suit No F22-333-86 (High Court, Kuala Lumpur)

RR Chelliah (*K Balaguru* with him) for the appellant.
P Royan for the respondent.

Cur Adv Vult

Lee Hun Hoe CJ (Borneo) (delivering the judgment of the court): This is an appeal against the decision of the learned judge confirming the order he made earlier in chambers.

By an agreement dated 28 September 1983 the plaintiff/respondent agreed to sell and the defendant/appellant agreed to buy a small piece of land of about three quarters of an acre situated in an area known as the Golden Triangle of Kuala Lumpur for $15,110,700. The land was held under Selangor Certificate of Title No 8571 lot No 73 s 57, town and district of Kuala Lumpur together with a building erected thereon and known as No 34, Jalan Sultan Ismail, Kuala Lumpur. The purchase price was to be paid by instalments of which the last payment was to be made on 27 September 1984. The defendant was to be given vacant possession after payment of the purchase price in full. However, in order to facilitate development of the property, the plaintiff, at the request of the defendant, delivered the property to the defendant in June 1984 despite the fact that payment in full had not been made. The defendant had since demolished all the buildings on the land in order to prepare the land for development.

On 27 September 1984 the defendant failed to pay the last instalment and was given time to pay. Subsequently, the balance was reduced to $4,500,000.

By a letter dated 17 June 1986 the defendant's solicitors wrote to the plaintiff indicating that the defendant was unable to pay the balance of $4,500,000. They pointed out that:

> In accordance with cl 9.01 of the agreement upon default of payment by our client all sums paid by our client under the agreement shall have to be refunded subject to deduction of agreed liquidated damages not exceeding 25% of the purchase price.

In reply the plaintiff's solicitors wrote on 23 June 1986 to the defendant's solicitors requesting the defendant to complete the purchase. They made clear in paras 3 and 4 that:

> 3 We wish to draw your attention to cl 8.01 (not cl 9.01 as stated in your letter) of the said agreement dated 28 September 1983 which specifically provides for the remedy of specific performance in the event of default by your clients as purchasers to pay any part of the purchase price.
>
> 4 Furthermore, our clients have at the request of your clients already delivered vacant possession of the said property to your clients and your clients have demolished all the buildings on the said property.

The plaintiff sued the defendant on 11 July 1986 and claimed, inter alia, specific performance. By para 6 of the defence it is contended that cl 8 provides that in the event of default of payment the plaintiff can either claim for specific performance or liquidated damages agreed at 25% of the purchase price. In the event of forfeiture of the liquidated damages the plaintiff would refund the defendant the balance of the payment. The defendant claimed for refund of $6,833,025. In defence to the counterclaim the plaintiff pointed out that he was entitled to the alternative remedy of specific performance. Therefore, the question of refund does not arise.

By summons in chambers dated 4 August 1986 the plaintiff applied pursuant to O 81 of the Rules of the High Court 1980 for specific performance. The learned judge made the order on 15 April 1987. At the request of the defendant the learned judge heard further argument. On 26 October 1987 he confirmed the decision he made earlier in ordering specific performance of the contract. Hence the present appeal.

In *Sale and Purchase of Real Property* Professor Visu Sinnadurai observes that specific performance is a discretionary remedy and over the years the courts have spelt out the circumstances under which the relief may not be granted. These equitable principles are reflected in ss 20 and 21 of the Specific Relief Act. Section 20(1)(a) provides that a contract will not be specifically enforced if the non-performance of it can be adequately relieved by compensation in money. As Professor Sinnadurai correctly pointed out at p 436 this provision has to be read with some reservation in dealing with contracts for the sale and purchase of property. Section 11(2) clearly says that there is a presumption that in contracts for the sale of immovable property monetary compensation cannot be an adequate remedy. It was further shown that s 20(1)(a) is of general application while s 11(2) deals specifically with contracts for the sale of land. It is therefore right that s 11(2) will prevail in cases involving contracts dealing with sale and purchase of property. He concluded his observation thus:

> ....The effect of these two sections is that it is for the defendant to establish that the plaintiff would be adequately relieved by an award for damages and that specific performance should not be granted. This burden of proof on the

defendant is a heavy one and if he fails to satisfy the court of the adequacy of damages, the court will generally grant the relief to the plaintiff unless there are other special grounds against granting it.

Under s 21(2)(b) the courts may refuse to grant the relief of specific performance to the plaintiff if the granting of it would involve some hardship on the defendant which he did not foresee. Each case must be decided on its particular facts. In *RM Venkatachalam Chettiar & Ors* v *NKR Arunasalam Chettiar*[1] Thomson J as he then was, held that no great hardship would be caused to the vendor's representative to complete the transaction even if it would incur some unanticipated expenditure. In *Haji Osman bin Abu Bakar* v *Saiyed Noor bin Saiyed Mohamed*[2] specific performance was granted. The court rejected the argument that hardship would be caused to the beneficiaries if such an order was granted. The appellant in *Patel & Anor* v *Ali & Anor*[3] was successful in her appeal against an order of specific performance on ground of hardship. There was in that case a period of more than four years' delay and it would be just to leave plaintiffs to their remedy in damages. In *Johnson & Anor* v *Agnew*[4] the House of Lords varied the order of the Court of Appeal holding that if a vendor obtained an order for specific performance and it became impossible to enforce it, he then had the right to ask the court to discharge the order and terminate the contract. On such an application he could be awarded damages at common law for breach of contract since the contract was not rescinded ab initio but remained in existence until it was terminated by the court.

Finally, the New Zealand case of *Nicholas* v *Ingram*[5] where the defence was based solely on financial inability to complete. We refer to the headnotes. In an action for specific performance of a contract for the sale of land, hardship on the part of the defendant may operate as a defence. But the hardship must, in general, be such as existed at the time of the contract and not such as has arisen subsequently from a change of circumstances.

The plaintiff does not agree with the defendant's interpretation of cl 8. The vendor has a choice either to get specific performance or to get liquidated damages. Even before the full purchase price was paid the vendor gave possession of land to the purchaser who acted as if the land was his by demolishing all the buildings on the land in preparation for development.

In *Specific Performance* by Gareth Jones and William Goodhart QC under the heading 'Specific Performance Will Be Denied If Damages Are An Adequate Remedy' at p 20 it is stated that:

> The mere fact that a contract contains a liquidated damages clause, or a clause of a similar nature, is not generally an admission that the parties have agreed that damages are an adequate remedy or that one party has an option to pay or perform, specific performance will nonetheless be granted if it is the appropriate remedy ...

This point was made clear by the Privy Council in the case of *Zaibun Sa binti Syed Ahmad* v *Loh Koon Moy & Anor*.[6] There the respondents sought specific performance of contract for the sale of land against the appellant. The learned judge decided in favour of the respondents but found that there was an oral agreement enabling the respondents to pay damages for breach. He therefore gave damages in favour of the respondents who appealed to the Federal Court seeking specific performance of the contract. The Federal Court held that the respondents were entitled to specific performance. In dismissing the appeal the Privy Council held, inter alia, that the fact that there was an alternative claim for damages, in an action by the purchaser for specific performance of a contract for the sale of land, could not be a fact relevant to the exercise of the discretion by the learned judge and the Federal Court was entitled to exercise its discretion and was correct in reversing the decision of the judge and ordering specific performance. As Lord Russell of Killowen in delivering the judgment of the Board at p 94 questioned the refusal of the learned judge to grant specific performance just because the learned judge thought a sum was fixed in consideration of the purchase. He observed:

> ... If he thought that the fixing of the sum of $5,000 deprived him of jurisdiction to order specific performance he appears to have ignored s 19 of the Specific Relief Act, the terms of which are as follows:
>
> > A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same.

The defendant submitted that the law was covered by the Specific Relief Act 1950. Section 11(1)(c) makes clear that specific performance may be enforced at the discretion of the court. It is to be granted only when pecuniary compensation is not an adequate remedy. In the instant case it is clear from cl 8 of the agreement that the parties themselves were of the view that if there was a breach pecuniary compensation would be adequate by payment of 25% of the purchase price. Section 11(2) does not apply to this case as it is not concerned with a breach to transfer property but a breach to pay money. Section 20 shows contracts which cannot be specifically enforced. Section 21(2) deals with question of hardship. The purchaser was unable to raise money. One cannot compel an impecunious person to pay over $4 million. The purchaser can be liable for damages which can be assessed later but should not be dealt with in a summary way.

The vendor has still got the land which he can sell to others. He may not be able to get the same purchase price

when he sells the land. However, he may get damages from the purchaser for his loss in damages.

In theory specific performance may be ordered against either party. In practice it is rarely done because of the difficulty of performance. The learned judge did not ask himself whether compensation in money was adequate or not. If adequate, then he should not grant specific performance. Also, he did not consider whether the purchaser was in a position to pay.

The same points were raised in the lower court. The defendant stated that the defence rested on two grounds, namely, adequate remedy and hardship. On hardship, the case of *Patel & Anor* v *Ali & Anor*[3] was referred to. So also *Johnson & Anor* v *Agnew*[4] and *Nicholas* v *Ingram*.[5] Basically, the defence is saying that financial hardship has resulted in their not being able to complete the purchase.

The learned judge found difficulty in reconciling some of the case law on the subject. He was much influenced by the New Zealand case of *Nicholas* v *Ingram*[5] which held that a purchaser's inability to raise the purchase money is not a ground for refusing specific performance. He was aware that the appellant could not raise the money to meet the balance of the purchase price. The fact that the appellant had to borrow money to pay a large part of the purchase price is not a factor to influence his decision.

When the matter came before the learned judge for further argument it was pointed out by the defendant that 'the principles which apply to an application under O 81 r 1 are the same as those which govern application under O 14.' After hearing further arguments from both parties he had no reason to change his view. In fact, he confirmed the decision he made earlier in chambers. The appellant had been given possession of the land and he had demolished the buildings thereon even before he had paid the purchase price in full.

We agree with the learned judge when he said that the hardship had been brought by the appellant himself when he decided to embark on this expensive venture without having secured adequate finance. We see no reason to interfere with the exercise of the discretion by the learned judge. He has exercised his discretion judicially and properly.

For reasons given we would dismiss the appeal with costs. Deposit to respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *AK Lee & Co*; *Shook Lin & Bok*.

Reported by *Prof Ahmad Ibrahim*

Public Prosecutor v Leonard Glenn Francis

HIGH COURT (PENANG) – CRIMINAL APPEAL NO 51-52-87
EDGAR JOSEPH JR J
1 MARCH 1989

Criminal Procedure – Sentencing – Plea of guilty to offence of unlawful possession of firearms under s 8 of Firearms (Increased Penalties) Act 1971 – Order of binding over under s 294 of Criminal Procedure Code made by trial judge – Mandatory sentence of whipping not imposed – Whether trial judge in error – Firearms (Increased Penalties) Act 1971, s 8 – Criminal Procedure Code (FMS Cap 6), s 294

Criminal Procedure – Sentencing – $5,000 fine for offence of unlawful possession of ammunition – Whether sentence manifestly inadequate – Omission to take public interest into account – Arms Act 1960, s 8

The respondent pleaded guilty to the charges of (a) unlawful possession of firearms, an offence punishable under s 8 of the Firearms (Increased Penalties) Act 1971; and (b) unlawful possession of 14 rounds of ammunition, an offence punishable under s 8(a) of the Arms Act 1960. With respect to the first charge, the learned president ordered the respondent to be bound over in the sum of $10,000 with two sureties for five years under s 294 of the Criminal Procedure Code (FMS Cap 6). On the second charge, the learned president fined him $5,000, in default one year's imprisonment. The public prosecutor appealed to the High Court against the sentences imposed, contending that they were manifestly inadequate.

In her grounds of decision, the learned president considered that there were grounds to bind the respondent over under s 294 of the Criminal Procedure Code as to the first charge and this made it unnecessary to impose a sentence of whipping which otherwise would have been mandatory under s 8 of the Firearms (Increased Penalties) Act 1971.

Held, allowing the public prosecutor's appeal on both charges:

(1) The learned president was clearly in error. Once a conviction is recorded in respect of an offence under s 8 of the Firearms (Increased Penalties) Act 1971, the provisions of s 294 of the Criminal Procedure Code are overridden and the court must proceed to impose a sentence of imprisonment and whipping with not less than six strokes. The sentence in respect of the first charge cannot be justified either in law or on principle. The order binding over the respondent under s 294 of the Criminal Procedure Code is quashed.

(2) Though the consultant psychiatrist had recommended in his report that the respondent be spared corporal punishment for health reasons, his report was an unsworn statement which was not tested by cross-examination though admittedly the prosecution did not contest the contents thereof. However, the medical officer who is required to examine and certify that the respondent is in a fit state of health to undergo whipping will be provided with copies of the report which he will no doubt take into consideration.

(3) As far as the second charge was concerned, the learned president herself had conceded that she had made the mistake of dealing with each charge in isolation and in her anxiety to avoid having to make an order for whipping she failed to consider that a sentence of imprisonment may have been appropriate in order to reflect the serious nature of the offence and to serve as a deterrent to potential offenders. The learned